U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

ADMINISTRATOR,
WAGE AND HOUR DIVISION,
UNITED STATES DEPARTMENT OF LABOR,

PLAINTIFF,

v.

MERLE ELDERKIN d/b/a ELDERKIN FARM,

RESPONDENT.

ARB CASE NO. 99-033
99-048

ALJ CASE NO. 95-CLA-31

DATE: June 30, 2000

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Plaintiff:
Ellen R. Edmonds, Esq., Roger Wilkinson, Esq., Linda Jan S. Pack, Esq., Steven J. Mandel, Esq., *U.S. Department of Labor, Washington, D.C.*

For the Respondent:
James E. Westman, Esq., *Westman and Associates, Jamestown, New York*

FINAL DECISION AND ORDER

On January 1, 1995, ten-year-old Peter Gage was severely injured on the Elderkin Farm when his clothing became caught in the machinery of a feeder wagon. The machinery pulled him in, repeatedly banged his head, severed his right arm, and threw him out the other side.[1/] The farm was owned and operated by Respondent Merle Elderkin. The accident precipitated an investigation by the Wage and Hour Division into Elderkin's compliance with the child labor provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§212(c) and 213(c)(2) (1994). The Division found numerous violations involving several children and assessed $71,100 in civil money penalties against

[1/] Immediately after the accident, Merle Elderkin rushed Peter to the local firehouse which took him to the hospital. Peter's arm was reattached at the hospital. Medical records indicate Peter has regained some sensation in and use of his right arm.

Elderkin. 29 U.S.C. §216(e). Elderkin excepted to that assessment, and a hearing was held before a Department of Labor Administrative Law Judge (ALJ). 29 C.F.R. §§580.10(a) and 580.11 (1998). After the ALJ issued his decision, both Elderkin and the Administrator of the Wage and Hour Division filed appeals with the Administrative Review Board pursuant to 29 C.F.R. §580.13. For the reasons we discuss below, we deny Elderkin's petition, grant the Administrator's petition, and order Elderkin to pay $71,100 in civil money penalties for violations of child labor provisions of the FLSA.

BACKGROUND

The issues which are before us on appeal relate in large part to the unusual history of the case. We describe the investigation, prehearing activities, the hearing, and the ALJ's decision below.

I. The Wage and Hour Division Investigation and Prehearing Issues

The Wage and Hour Division initiated its investigation of possible child labor violations at Elderkin Farm by sending two Division investigators to interview Merle Elderkin. When asked about his payroll records for employees, Elderkin said he had no employees and used independent contractors to perform tasks on the farm. Elderkin then cut short the interview and referred the investigators to his attorney. Before leaving, the investigators gave Elderkin written information about the child labor laws. The investigators then interviewed Peter Gage in his hospital room and wrote out his oral statement about the accident and his work at Elderkin Farm.

The Division investigators also interviewed present and former employees of the farm, and interviewed and corresponded with Elderkin's then-attorney, requesting various documents and records. The attorney did not provide the documents requested by the investigators. However, the interviews of present and former employees of the farm uncovered information that minors in addition to Peter Gage had been employed there. One minor employee told the investigators that on the evening prior to talking with them he had operated a chain saw to cut firewood at Elderkin's home on the farm, and on the day of his interview he had driven a tractor to plow snow there.

The investigators determined that a total of eight minors had been illegally employed at the Elderkin Farm in hazardous occupations specifically prohibited by Department of Labor regulations. *See* 29 C.F.R. §570.71. These occupations included operating a fork lift, assisting in operation of a forage blower, working inside a manure pit, working in a yard occupied by a bull, and operating a tractor of over 20 PTO (power take off) horsepower. The minors were as young as 7, 10, and 11 years old when they first began working on the farm.

Using standard Wage and Hour Division Form WH-266 for calculating civil money penalties, the investigators assessed total penalties of $71,100. Elderkin contested the penalties and requested a hearing.

Prior to the hearing, the Department of Labor served several discovery requests on Elderkin, which were never answered. Elderkin was given numerous opportunities to respond to the requests

and was ordered to do so by the Chief ALJ. After issuing an Order to Show Cause and finding that Elderkin's response to that order was inadequate, the Chief ALJ imposed sanctions:

> Despite their protestations to the contrary, both Respondent and his counsel purposefully refused to respond to the discovery requests or my Orders, nor did they seek an extension of time in which they could attempt to comply. Respondent flouted the discovery rules and demonstrated an obvious lack of respect for this proceeding and this tribunal. However, as Respondent is now attempting and proceeding to comply with my Order and the discovery requests, the sanction of a default judgment is too harsh. . . .

Order [of the Chief ALJ] Granting Sanctions, Aug. 12, 1996, at 3. Therefore, instead of issuing a default judgment, the Chief ALJ ordered a lesser sanction:

> [I]t shall be inferred that the admissions, testimony, documents or other evidence that should have been produced are adverse to Respondent, . . . that matters concerning which the Order [to Show Cause] was issued are taken as established adversely to Respondent, . . . that Respondent may not introduce into evidence or otherwise rely upon testimony in support of or in opposition to any claim or defense that was the subject of these discovery requests at issue, . . . and that Respondent may not object to the introduction and use of secondary evidence to show what the withheld admissions, testimony, documents or other evidence would have shown . . . .

Id. at 4.

The ALJ to whom the case was assigned for hearing applied the Chief ALJ's Order Granting Sanctions and specifically adopted the Administrator's Findings of Fact and Conclusions of Law. Exhibit A to ALJ's Order Granting Complainant's Motion for Summary Decision, April 16, 1998, at 2.[2/] The Findings of Fact detailed violations of hazardous occupation orders involving the eight children. Thus, each of the children, including Peter Gage, "operated, assisted to operate, or otherwise ran or helped to run any equipment, on Respondent's premises, at Respondent's direction or with Respondent's knowledge, for the benefit of Respondent or Respondent's operations"; "operated a tractor of over 20 PTO horsepower, or connected or disconnected an implement or any of its parts to or from such a tractor"; "worked on Respondent's premises in a yard, pen, or stall, occupied by a bull, boar, sow with suckling pigs, or cow with newborn calf (with umbilical cord present)"; and "worked inside a manure pit." Findings of Fact and Conclusions of Law (Findings of Fact) at ¶¶ 35-39. The adopted conclusions of law held that each of the children were "employees of Respondent as defined by section 3(e) of the Act . . . ." Conclusions of Law at ¶ 5.

The ALJ narrowly limited the issues remaining to be decided to "(1) the appropriateness and reasonableness of the civil money penalties assessed in the amount of $71,000.00, [sic] . . . and (2)

[2/] The Findings of Fact were also attached to the ALJ's Decision and Order (D. & O.).

whether . . . Peter Gage has [sic] his right arm severed [while operating farm machinery, a hazardous occupation specifically prohibited by Department of Labor regulations], and further whether he was an employee [under the FLSA] when he suffered his injury . . . ." April 16, 1998 Order at 2.

II. The Hearing

At the subsequent hearing, Peter Gage; the Wage and Hour Division investigators; Merle Elderkin and his son, Andrew; and a farm equipment specialist testified. Wage and Hour Investigator Chenu testified that eight minors were found to be illegally employed, five of whom subjected Elderkin to civil money penalties. Investigator Chenu explained how Form WH-266 was used to compute the civil money penalty (CMP) assessed against Elderkin. The investigator explained how the various factors listed in the CMP regulations are accounted for in the Form WH-266 schedule and described the use of a two times multiplier because of "aggravating factors."

Elderkin and his son testified about the accident, the farm's operation, and Elderkin's financial situation.

III. The ALJ's Decision

The ALJ held that Peter Gage was Elderkin's employee within the meaning of the FLSA. He based this conclusion on the following facts:

- Peter's uncles had shot out some windows on the Elderkin Farm with BB guns, and Peter had been held responsible for the incident. Peter received cash or credit toward the windows from Elderkin as compensation for the work he did on the farm.

- Merle Elderkin permitted Peter to work and had knowledge of the work performed.

- Peter was an employee at the time of the accident because he assisted in the operation of the feed mixer by reading the scale on the mixer computer screen and also because he operated the tractor by turning the feed mixer on and off.

D. & O. at 8-9.

As to the appropriateness of the CMP assessed by the Division, the ALJ pointed out that the ARB has held that an ALJ has broad authority to deny, reverse, or modify the Administrator's penalty assessment. D. & O. at 9-10. He noted that the penalty originally was calculated at $141,000, but was reduced to $71,100 because of a $10,000 per minor limit in the statute. D. & O. at 10.

The ALJ found, however, that the two times multiplier the Division applied to the penalty was not appropriate, because Elderkin had already been assessed a penalty for record-keeping violations under Part B of WH-266, and because the ALJ believed Elderkin's assurances of future compliance made at the hearing. D. & O. at 11. Eliminating the two times multiplier, the ALJ reduced the penalty to $58,100. *Id.*

The ALJ then reduced the penalty further because he concluded that the "financial resources of the business" factor listed in the regulations (29 C.F.R. §579.5(b)) was not properly considered in assessing the penalty. D. & O. at 12. Elderkin presented evidence at the hearing that Elderkin Farm was in serious financial trouble and had filed for bankruptcy after the CMP were assessed. The ALJ noted the purposes of the child labor laws and the civil money penalty provisions to protect the safety, health, well being, and opportunities for schooling of minors and to punish past and deter future violations. *Id.* But the ALJ also found that "[I]t is doubtful that the penalties are designed to drive violators out of business." He concluded that "considering the Respondent's financial condition, another large judgment against him could force him out of business entirely," and that "therefore a reduction of the penalties is justified in order to serve as a punishment and deterrent while at the same time not driving the Respondent out of business." *Id.* The ALJ observed that Elderkin was "truly sorry" for Peter Gage's injury and that Elderkin "will suffer" because his violation of the child labor laws caused a serious injury. However, the ALJ rejected Elderkin's argument that the penalty should be reduced to zero. He found that the injury to Peter Gage was not *de minimis*, and the amount of the violations and the fact that children as young as seven were employed precluded further reduction. He also found that the violations were intentional or the result of heedless exposure of minors to dangerous and unhealthy conditions. D. & O. at 13. The ALJ therefore concluded that "a 50% reduction is appropriate," resulting in a total CMP of $29,050. *Id.*

STANDARD OF REVIEW

We review the ALJ's decision *de novo*. 29 U.S.C. §216(e); 5 U.S.C. §544 (1994). *Administrator, Wage and Hour Division v. Sizzler Family Steakhouse*, 90-CLA-35 (Sec'y. 1995), slip op. at 4.

DISCUSSION

We begin our discussion of this case with a description of the statutory and regulatory framework. The FLSA provides that "[no [covered] employer shall employ any oppressive child labor . . ." (29 U.S.C. §212(c)), and that the oppressive child labor provision of the Act "shall apply to an employee below the age of sixteen employed in agriculture in an occupation that the Secretary of Labor finds and declares to be particularly hazardous for the employment of children below the age of sixteen . . . ." 29 U.S.C. §213(c)(2) (1994). The Secretary has promulgated Agriculture Hazardous Occupations Orders, which identify tasks children under sixteen are prohibited from performing. These include:

> (1) Operating a tractor of over 20 PTO horsepower, or connecting or disconnecting an implement or any of its parts to or from such a tractor.
>
> (2) Operating or assisting to operate (including starting, stopping, adjusting, feeding, or any other activity involving physical contact associated with the operation) any of the following machines . . . (ii) . . . the unloading mechanism of a nongravity-type self-unloading wagon or trailer . . . .
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> * * * *
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> (4) Working on a farm in a yard, pen, or stall occupied by a . . . (ii) Sow with suckling pigs, or cow with newborn calf . . . .
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> * * * *
>
> (8) Working inside . . . (iii) A manure pit . . . .

29 C.F.R. §570.71.

The FLSA provides that "[a]ny person who violates the provisions of section 212 . . . relating to child labor, or any regulations issued under section 212 . . . shall be subject to a civil penalty of not to exceed $10,000 for each employee who was the subject of such violation." 29 U.S.C. § 216(e). The size of the business and the gravity of the violations are to be taken into account in assessing a penalty. *Id.*

The Secretary has promulgated regulations at 29 C.F.R. Parts 579 and 580 establishing how CMPs are to be assessed by the Wage and Hour Division. The regulations require that a number of factors be considered in assessing CMPs in each case. The Secretary has also promulgated regulations which are applicable to CMP proceedings before ALJs and the ARB.[3/] These regulations provide in pertinent part:

> (b) The decision of the [ALJ] shall be limited to a determination of whether the respondent has committed a violation . . . , and the appropriateness of the penalty assessed by the Administrator.
>
> (c) The decision . . . may affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator.

29 C.F.R. §580.12.

With this statutory and regulatory framework in mind, we turn to the issues raised on review by Elderkin and the Administrator.

[3/] On April 17, 1996, the Secretary delegated jurisdiction to issue final agency decisions under this statute to the Administrative Review Board. Secretary's Order 2-96, 61 Fed. Reg. 19978 (May 3, 1996).

I. Whether Peter Gage was Elderkin's Employee within the Meaning of the FLSA.

Elderkin argues on appeal that Peter Gage was not an employee within the meaning of the FLSA. He relies on inconsistencies between Peter's statement to the investigators two weeks after the accident and his testimony at the hearing, and on the facts that Peter admitted he did not punch a time card, file any reports on his employment, or work at any specific time. Elderkin states that he did not pay Peter anything, did not direct him to do work, and was not aware of any work that Peter performed on the farm.

We agree with the ALJ that, under the especially inclusive language of the FLSA, Peter Gage was an employee of the Elderkin Farm.

We begin with the language of the statute itself. The FLSA defines an "employee" as "any individual employed by an employer." 29 U.S.C. §203(e)(1). "[E]mployer" is defined as "any person acting directly or indirectly in the interest of an employer in relation to an employee" (29 U.S.C. §203(d)), and "employ" is defined as "to suffer or permit to work." 29 U.S.C. §203(g). Thus, an "employee" is "any individual" who an employer "suffer[s] or permit[s] to work" in the employer's business.

The Supreme Court has held that the definition of employee in the FLSA is "'comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category.'" *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947) (quoting *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150 (1947)). Under the FLSA the term "employee" is used in "the broadest sense 'ever . . . included in any one act.'" *United States v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945), *quoting* Sen. Hugo Black, 81 Cong. Rec. 7657 (1937).[4/] Applying the FLSA's definitional provisions to the facts of this case, we think there can be no doubt that Elderkin permitted Peter Gage to work on the farm. Thus the Findings of Fact which were imposed as a sanction explicitly provide that between January 1993 and September 5, 1995, Peter Gage: (1) operated a tractor on the farm, "or connected or disconnected an implement or any of its parts to or from such a tractor"; (2) "operated, assisted to operate, or otherwise ran or helped to run any equipment . . . on [the Elderkin Farm], at [Elderkin's] direction or with [Elderkin's] knowledge, for the benefit of [Elderkin] or [Elderkin's] operations"; (3) "worked on Elderkin's premises in a yard, pen, or stall occupied by a bull, boar, sow with suckling

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[4/] The Supreme Court has contrasted the expansive scope of the FLSA's coverage of employees with that of the Employee Retirement Income Security Act (ERISA). In *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992), the Court ruled that in the absence of a useful statutory definition or clear legislative history, the term "employee" as used in ERISA should be given its common law meaning. While indicating that it might well apply this rule to a wide variety of statutes which had definitions of "employee" similar to ERISA, the Court specifically noted that the definition of employee under the FLSA was to be given a much broader meaning. The Court found it significant that the FLSA defines "employ" to mean "suffer or permit to work." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. at 326. "This latter definition, whose striking breadth we have previously noted, . . . stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles." *Id.*

pigs, or cow with a newborn calf with umbilical cord present"; (4) "rode on a tractor as a passenger or helper; and (5) worked inside a manure pit. D. & O. Appendix A at ¶¶ 35-39.[5/]

Moreover, on the day of the accident, Peter fed the calves, scraped manure from the barn, and helped to rig the feed mixer machine – all work on the farm. And, it is clear that Elderkin was aware that Peter was working on his farm that day. Peter testified that the day of the accident Elderkin said to him, "are you working here[?]" When Peter said "yes," Elderkin replied "you better be." D. & O. at 3. Finally, we concur with the ALJ's explicit finding that Peter Gage was injured while he was helping his stepfather operate the feed mixer by reading the scale on the mixer's screen. D. & O. at 9.

Elderkin challenges the ALJ's findings regarding Peter's status as an employee based in part on an attack on Peter Gage's credibility. Statement of Respondent in Support of Petition for Review at 13. Elderkin points out that in the oral statement he gave to the Division investigator while he was in the hospital, Peter stated that Elderkin had paid him $15.00 a day in cash for his work on the farm. On the other hand, at the hearing Peter testified that he had not been paid, but had been given credit for the broken windows in return for his work. Moreover, Elderkin asserts that at the hearing Peter testified that he was working at the farm at the time of the accident, while in the statement taken by the Division he said that "he was not working at the Elderkin farm at the time of his accident. He said that he was supposed to stay in the family car while his stepfather, Frank Strouhauer, was working at the Elderkin farm . . . ," and that he had just gotten out of the car and "was minding his own business and was just standing around when the accident occurred." *Id.* We do not find these asserted inconsistencies in Peter's statements sufficient to overturn the credibility determinations of the ALJ, who implicitly credited Peter's testimony and discredited that of Elderkin and his son when he found that Peter was working at the farm on the day he was hurt.[6/] Moreover, although one might conclude from Peter's oral statement that he was not working on the farm at the exact moment he was injured, he explicitly said that he had been working on the farm that day:

> I got hurt [N]ew [Y]ear's day at about 9:30 at night. I was supposed to stay in the car. My dad was loading up the feed mixer. I got out of the car to look at the scales on the feed wagon. My Dad wasn't right there, he was getting more feed. I was just minding my own business just standing there. The PTO is supposed to say in one spot. It kept moving closer and closer. It caught the strings hanging off my snow suit, pulled me in, kept banging my head against the metal, ripped my right arm off and threw me out the other side . *I had worked that day and hadn't been home yet.* When I got hurt my Dad was getting feed and Merle and Andy Elderkin were in the barn.

[5/] On review, Elderkin does not directly challenge the sanctions order. In any event, the ALJ has broad discretion to exact penalties for failure to abide by discovery orders. *See* 29 C.F.R. §18.6(d). We find no abuse of discretion here, where Elderkin failed to comply with discovery and repeated orders of the Chief ALJ.

[6/] Of course, an ALJ's credibility determinations are entitled to deference. *See Donato v. Plainview-Old Bethpage Central Sch. Dist.,* 96 F.3d 623 (2d Cir. 1996).

Plaintiff's Exhibit (P) - 15 at unnumbered page 4. Based upon the credible testimony of Peter Gage, we conclude – as did the ALJ – that Peter Gage was working at the Elderkin farm on the day of the accident.

That is not the end of the matter, however. Although it is not entirely clear from his brief, Elderkin appears to argue that when Peter Gage was working on the farm, he was doing so either as an independent contractor or as an employee of his stepfather, who assertedly was an independent contractor. In order to determine whether Peter was an independent contractor, we look to the "economic reality" of his relationship with Elderkin. *Rutherford Food Corp. v. McComb*, 331 U.S. at 730; *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947) (Social Security Act). Several factors are useful in determining whether, as a matter of "economic reality" someone is an employee or an independent contractor for purposes of the FLSA. These factors, derived from *United States v. Silk*, 331 U.S. 704, 716 (1947) (Social Security Act), include:

> (1) [T]he degree of control exercised by the employer over the worker; (2) the worker's opportunity for profit or loss and his investment in the business; (3) the degree of skill and independent initiative required to perform the work; (4) the permanence or duration of the working relationship; and (5) the extent to which the work is an integral part of the employer's business.

Brock v. Superior Care, Inc., 840 F.2d 1054, 1058-59 (2d Cir. 1988), *citing United States v. Silk*, 311 U.S. at 716. "No one of [the factors cited above] in isolation is dispositive; rather the test is based upon a totality of the circumstances." *Id.* at 1059. *See also Rutherford Food Corp. v. McComb*, 331 U.S. at 730 (1947).

Our evaluation of the evidence in the record in light of these factors leads us to conclude that Peter Gage was Elderkin's employee and not an independent contractor at the time he was injured. While there is no evidence that Elderkin directly controlled the tasks performed by Peter Gage on that day, all of those tasks -- feeding the calves, scraping manure from the barn, helping to rig the feed mixer machine, and reading the gauge on the feed wagon -- were integral to Elderkin's business of operating a farm.[7/] Peter obviously had no opportunity for profit or loss, but rather was paid or given credit toward the cost of the broken windows. D. & O. at 8. It is clear he had no investment in the farm's facilities. There was no particular skill required for the tasks he performed. Although the relationship between Elderkin and Peter was an informal one, it is clear that Elderkin was aware that Peter was working on his farm.

Not all of the factors described above weigh in favor of a conclusion that Peter Gage was Elderkin's employee on the date of the accident. The informality of the relationship weighs in favor of independent contractor status. However, Peter had no opportunity for profit or loss, was not invested in the business, needed no skills to perform the work, and was performing work which was

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[7/] It is also possible that Elderkin is arguing that Peter was working as an employee of his stepfather, Frank Strouhauer, at the time of the accident, and that Strouhauer was an independent contractor and not an employee of Elderkin. Even if this were a plausible theory, we agree with the Administrator (Petitioner's Br. at 7-8) that Elderkin was at least a joint employer.

integral to Elderkin's business. We hold that Peter Gage was an employee of the Elderkin Farm at the time of the accident.

II. The Appropriateness of the Civil Money Penalty

We turn to the issue of the appropriateness of the penalty which was assessed. The ALJ held that he had authority to affirm, deny, reverse or modify the determination of the civil money penalty by the Administrator and reduced the penalty from the $71,100 that the Administrator had assessed to $29,050. In so ruling, the ALJ analyzed and rejected two aspects of the Administrator's use of Form WH-266 to calculate the CMP and found that the Administrator had not given sufficient weight to Elderkin's financial status. Both parties challenge the penalty imposed by the ALJ, but for different reasons. The Administrator argues that the ALJ improperly rejected the Administrator's application of the Form WH-266 schedule to the facts, and asserts that the appropriate penalty is $71,100. On the other hand, Elderkin argues that the ALJ did not go far enough, and the penalty should be reduced to zero. We conclude that once a CMP has been challenged before an ALJ the issue is not whether the penalty assessed by the Administrator comports with the formula and matrix contained in Form WH-266. Rather, the question is whether the assessed penalty complies with the statutory provision regarding CMP and the CMP regulations. Applying that legal standard to the penalty assessed in this case we conclude that a civil money penalty of $71,100 is appropriate.

We begin our inquiry with the statutory civil money penalty provision:

> Any person who violates the provisions of section 212 or section 213(c)(5) of this title, relating to child labor, or any regulation issued under section 212 or section 213(c)(5) of this title, shall be subject to a civil penalty of not to exceed $10,000 for each employee who was the subject of such a violation . . . . In determining the amount of any penalty under this subsection, **the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered.**

29 U.S.C. §216(e) (1994) (emphasis added). The Department's implementing regulations elaborate on this statutory requirement:

> (a) The administrative determination of the amount of the civil penalty. . . shall be based on the available evidence of the violation or violations and **shall take into consideration the size of the business of the person charged and the gravity of the violations as provided in paragraphs (b) through (d) of this section.**
>
> (b) In determining the amount of such penalty **there shall be considered the appropriateness of such penalty to the size of the business of the person charged with the violation or violations**, taking into account the number of employees employed by that person (and if the employment is in agriculture, the man-days of hired farm

> labor used in pertinent calendar quarters), dollar volume of sales or business done, amount of capital investment and financial resources, and such other information as may be available relative to the size of the business of such person.
>
> (c) In determining the amount of such penalty **there shall be considered the appropriateness of such penalty to the gravity of the violation or violations**, taking into account, among other things, any history of prior violations; any evidence of willfulness or failure to take reasonable precautions to avoid violations; the number of minors illegally employed; the age of minors so employed and records of the required proof of age; the occupations in which the minors were so employed; exposure of such minors to hazards and any resultant injury to such minors; the duration of such illegal employment; and, as appropriate, the hours of the day in which it occurred and whether such employment was during or outside school hours.

29 C.F.R. §579.5 (emphasis added). The regulations include additional direction regarding the assessment of the penalty:

> (d) Based on all the evidence available, including the investigation history of the person so charged and the degree of willfulness involved in the violation, it shall further be determined where appropriate, (1) Whether the evidence shows that the violation is "de minimis" and that the person so charged has given credible assurance of future compliance, and whether a civil penalty in the circumstances is necessary to achieve the objectives of the Act; or (2) Whether the evidence shows that the person so charged had no previous history of child labor violations, that the violations themselves involved no intentional or heedless exposure of any minor to any obvious hazard or detriment to health or well being and were inadvertent, and that the person so charged has given credible assurance of future compliance, and whether a civil penalty in the circumstances is necessary to achieve the objectives of the act.

Id.

In turn, the Wage and Hour Division has developed the schedule, set out in the Child Labor Civil Money Penalty Report–Form WH-266, to standardize the application of the statutory and regulatory factors by Wage and Hour Division officials to child labor civil money penalty assessments.

The Board discussed the relationship between the Administrator's assessment procedure and the ALJ's review of that assessment in *Administrator v. Thirsty's, Inc.*, ARB Case No. 96-143, ALJ Case No. 94 CLA-65, Fin. Dec. and Ord., May 14,1997, *aff'd sub nom Thirsty's v. United States Department of Labor*, 57 F. Supp. 2d 431 (S.D. Tex. 1999). In *Thirsty's* the ALJ ruled that the use of Form WH-266 denied individual employers the due process guaranteed by the CMP regulations,

and that the penalty should be assessed only after all the evidence pertaining to the violations was considered in light of the factors delineated in the regulations. On review, the Board specifically approved of the Division's use of Form WH-266 to assess penalties in the first instance:

> The grid and matrix schedule incorporated in form WH-266 is an appropriate tool to be used by a field Compliance Officer to recommend penalties through the enumeration and determination of the gravity of actual violations . . . .
>
> * * * *
>
> We therefore reverse the ALJ's blanket dismissal of the schedule of standardized penalties and find the Administrator's establishment of a standardized penalty schedule for the initial recommended determination is not violative of the pertinent regulations.

Thirsty's, slip op. at 5-6. However, we emphasized that, once a CMP assessment has been appealed, the ALJ is not required to use the Form WH-266 schedule to determine a civil money penalty:

> We find that a presiding ALJ has the authority to review the case and to duly consider all the factors delineated by the pertinent regulations. An ALJ's scope of authority to change the Administrator's assessments is untrammeled, 29 C.F.R. §580.12(c), and specifically includes a determination of the appropriateness of the assessed penalty. 29 C.F.R. §580.12(b). We find that the review and modification of an assessed CMP is not an arrogation of the Administrator's authority, but a proper adjudicatory process.

Thirsty's, slip op. at 6. We reaffirm our holding in *Thirsty's*, that the proper inquiry for an ALJ when reviewing a child labor CMP is whether the penalty assessed by the Administrator is appropriate in light of the statutory and regulatory factors, and not whether the penalty comports with the Form WH-266 schedule. *Cf. Sellersburg Stone Company v. FMSHRC*, 736 F.2d 1147 (7th Cir. 1984) (under the Mine Safety and Health Act, statutory factors and not Mine Safety and Health Administration's penalty proposal formula are to be used by Federal Mine Safety and Health Review Commission and its ALJs to determine penalties).

In *Thirsty's*, however, we did not explicitly articulate the relationship between the ALJ's and the Board's decisions with regard to the review of CMP assessments. We do so today. Because our review pursuant to the APA is *de novo*, we are free to substitute our judgment for that of the ALJ. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951). The Seventh Circuit has put it aptly:

> The ALJ's determinations are not entitled to any special deference from the [administrative reviewing authority] except insofar as the ALJ's findings are based on witness credibility determinations. The

> agency is free independently to weigh the evidence and draw its own inferences.

Mattes v. U.S., 721 F.2d 1125, 1129 (7th Cir. 1983). The court noted that the ALJ is best situated to make credibility determinations based on the demeanor of witnesses. However, even credibility determinations are subject to *de novo* review when they are not demeanor-based. Moreover, to the extent that they are not demeanor-based, the reviewing authority is also free to reject the ALJ's inferences. *Mattes v. U.S.*, 721 F.2d at 1129 and n.5.

With these APA principles in mind, we evaluate the appropriateness of the penalty assessed, taking into account the size of the business and the gravity of the violations. Elderkin was found to have committed 41 violations of the child labor provisions involving a total of eight children. D. & O., App. A. In reviewing the appropriateness of the $71,100 penalty assessed by the Division, the ALJ found that the Division did not take adequate account of the size of Elderkin's business, particularly in regard to Elderkin's precarious financial situation, and that the Division had erroneously over-weighted certain facts relating to the gravity of the violation. As we discuss below, we disagree on both counts.

With regard to the size of the business factor, the ALJ found:

> Respondent's farming business is in serious financial trouble and he has filed for Chapter 13 bankruptcy. He has only been able to make minor capital investments in the farm over the past few years because of the lack of income and he and his son testified that the farm needed improvements that they were not able to make.

D. & O. at 12. The ALJ also found that "another large judgment against [Elderkin] could force him out of business entirely." The ALJ concluded that consideration of these factors warranted a fifty percent decrease in the penalty, "which would serve as a punishment and a deterrent while at the same time not driving the Respondent out of business." *Id.* Thus, the ALJ's evaluation of the evidence regarding Elderkin's financial situation played a significant role in his determination that the assessed penalty should be greatly reduced.

On the other hand, the ALJ rejected certain facts which are directly related to the evaluation of the gravity issue. First, the ALJ reasoned that the Administrator inappropriately increased the penalty assessment based on a finding that Elderkin had falsified and/or concealed information related to the employment of child labor. The ALJ found that Elderkin's child labor record keeping violations had been reflected elsewhere in the Administrator's penalty assessment. Therefore, to penalize Elderkin for falsification and concealment by increasing the overall penalty amounted to assessing a double penalty. The ALJ also disagreed with the Administrator's determination that Elderkin had been uncooperative with the Division investigators. "The Respondent testified that he was cooperative with the investigation, referring any requests for documents or further information to his attorney . . . . I do not find that the Respondent was uncooperative . . . ." D. & O. at 11.

Second, the ALJ found that the Administrator had not established that there was a "failure to assure future compliance" on the part of Elderkin, because he rejected the evidence the Administrator relied on to establish this fact:

> [T]he information relied upon to establish this fact was the interview with Brian Chadwick . . . . One activity described by Brian, operating a chain saw to cut firewood, was performed at the Respondent's home and not on the farm. He did not specify where the other activity, operating a tractor to plow snow, was performed and whether he was paid to perform either of these tasks. They did not corroborate Brian's allegations nor question the Respondent to verify his story.

D. & O. at 11 (footnote omitted). The ALJ also believed Elderkin's assurances of future compliance given at the hearing. *Id.* Taking all of the factors discussed above into account, the ALJ concluded that a penalty of $29,050 was appropriate.

Ten years ago Congress set about increasing the impact of civil money penalties for child labor and certain other FLSA violations by increasing the maximum penalty for child labor violations tenfold – from $1,000 to $10,000. Several factors led to this change in the law: investigations of child labor violations had soared; there was evidence that employers often considered the lower penalties as a cost of doing business; inflation had devalued the sting of the $1,000 maximum penalty; and the actual penalty ultimately paid often was just a fraction of the maximum amounts permitted. Kearns, ed., *The Fair Labor Standards Act*, Bureau of National Affairs, 1999, at 750. Mindful of the statutory purpose for civil money penalties, and having evaluated the facts *de novo*, we conclude that the penalty assessed by the Administrator is appropriate. Although the Elderkin Farm is small, and the evidence indicates serious financial difficulties, those facts, when weighed (as they must be) against the gravity of the violations, support a civil money penalty of $71,100.

The 700 acre Elderkin Farm produces milk with 300 head of cattle, and corn and grass for feed. Although Elderkin produced no documentary evidence regarding the number of people who worked on the farm, testimony in the record indicates that three or four adults worked on the farm full time, and several adults and children worked on the farm part time. In recent years Elderkin has made limited capital investments in the farm. Documents regarding his voluntary bankruptcy indicate that in 1997 his financial resources were limited because of a $200,000 judgment against him, and he was in arrears on $135,000 in property taxes. Based upon these facts we find the size of Elderkin's business to be small.

The fact that the business is small, however, does not necessarily lead to the conclusion that the appropriate penalty should be significantly less than that assessed by the Administrator, because we also must weigh the gravity of the violations. In contrast to the ALJ, we find that the gravity of the violations is high. First, two of the violations (the two relating to Peter Gage's injury) are extremely severe. It appears from the record that it is only good fortune that Peter Gage survived his injury. Moreover, the injury likely was caused because the feed mixer was missing a protective guard. We conclude that the gravity of these two particular violations is extremely high.

Several of the other violations also involved children working in hazardous occupations, including operating a fork lift, assisting in operation of a forage blower, working inside a manure pit, working in a yard occupied by a sow with suckling pigs or cow with newborn calf, and operating a tractor of over 20 PTO (power take off) horsepower. *See* 29 C.F.R. §570.71 (1999). These types of violations intrinsically are of elevated gravity given the potential for serious physical harm.

Second, the minors who were exposed were as young as 7, 10, and 11 years old when they first began working on the Farm. Thus, these children were not even marginally eligible to work in agriculture in hazardous occupations, for which the minimum age is 16.

Third, Elderkin failed to keep records of his minor employees, and actively misled the Wage and Hour Division investigators who were attempting to determine whether there had been child labor violations on the farm. Thus, in his first interview with Wage and Hour Division investigators Elderkin denied that he had minor (or indeed any) employees, and refused to provide any of the records requested by the investigators. Elderkin then referred all further inquiries to his attorney, who failed to respond to any requests for documents. Finally, through his attorney, Elderkin denied the investigators access to certain areas of the farm.[8/]

Fourth, Elderkin testified at the hearing that he would never allow minors to be present on the farm again. However, we agree with the Administrator that Elderkin's assurances of future compliance with the child labor laws were compromised by the fact that he allowed a twelve year old boy to engage in hazardous work on the farm after the Wage and Hour Division investigators gave him explicit information regarding the child labor laws.[9/]

In light of these facts -- the number and ages of the children, the large number of child labor and record keeping violations (41), the inherently dangerous work the children were performing, Elderkin's concealment and falsification, and the flaws in his assurances of future compliance -- we

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[8/] Thus, we specifically reject the ALJ's finding that Elderkin cooperated with the Division's investigation. D. & O. at 11.

[9/] We reject the ALJ's findings regarding that minor, Brian Chadwick. The ALJ found:

> One activity described by Brian, operating a chain saw to cut firewood, was performed at the Respondent's home and not on the farm. He did not specify where the other activity, operating a tractor to plow snow, was performed and whether he was paid to perform either of these tasks. They did not corroborate Brian's allegations nor question the Respondent to verify his story.

D. & O. at 11 (footnote omitted). Elderkin's residence was on the farm property. And whether or not the residence was on farm property, Elderkin's employment of a twelve year old child in hazardous employment (cutting firewood with a chain saw) was unlawful. *See* 29 C.F.R. §579.3(b). Whether Brian was paid for the tasks is largely irrelevant under the FLSA. As we have discussed above, the relevant inquiry is whether the employer "suffer[s] or permit[s] [the employee] to work."

find that the gravity of the violations is high.[10/] We conclude that, given the small size of the business and the high gravity of the violations, a civil money penalty of $71,100 is appropriate.

There remains one issue to discuss relative to the amount of the penalty. Elderkin argues that no penalty should be ordered as a sanction for misconduct on the part of one of the Wage and Hour investigators and counsel for the Administrator. First, Elderkin claims one of the Wage and Hour Division investigators testified untruthfully when he stated that he wrote the notes accompanying photographs of the farm and farm equipment. *See* P-7.[11/] Elderkin has not explained how the investigator's testimony that he wrote the photo notes in P-7 was misleading to the ALJ or this Board. Elderkin does not claim that the notes are factually inaccurate, for example. We do not think that this incident rises to the level of misconduct.

Second, Elderkin claims that the Administrator's counsel misled the ALJ by claiming that a witness, William Hancock, was not available to testify on April 28, 1998 (the hearing date), when that attorney and one of the investigators had spoken to Hancock that morning in the building in which the hearing was held. In an order of July 23, 1998, the ALJ sanctioned the Administrator for what he found was misleading conduct on the part of the Administrator's counsel by denying the admission into evidence of the written statements of William Hancock and his brother Jim Hancock. The Administrator has not pursued this issue on review. Elderkin has not shown how he was prejudiced by counsel's failure to reveal the availability of William Hancock to testify and we note, as did the ALJ, that Elderkin had not called him as a witness. Under these circumstances we think the sanction imposed by the ALJ was appropriate.

Third, Elderkin argues that counsel engaged in prosecutorial misconduct when he did not disclose and produce the statement of Peter Gage taken by the Wage and Hour investigators on January 17, 1995, although Elderkin's counsel requested that he be provided with witness statements. The record reflects that when asked to turn over witness statements prior to trial, the Administrator's attorney invoked the informers' privilege. PX 17. Elderkin's attorney did not file a motion to compel discovery pursuant to 29 C.F.R. §18.21. Instead, at the hearing he simply renewed his request for Gage's statement. In response, the Administrator's attorney asserted the attorney work-product privilege, arguing that the statement was written out by the Division investigator and not signed by Peter. When the ALJ ruled that Elderkin was entitled to see the statement, the attorney turned it over. There was nothing improper about counsel's invocation of the informers' privilege prior to the hearing. *See, e.g., Secretary of Labor v. Superior Care, Inc.*, 107 F.R.D. 395 (E.D. N.Y. 1985); *Brock v. On Shore Quality Control Specialists, Inc.*, 811 F.2d 282 (5th Cir. 1987). And whatever the merits of counsel's raising of the attorney work-product privilege, counsel turned over the statement when the ALJ ruled on the issue. In other words, the attorney's actions in this regard were "by the book." We find no misconduct here.

[10/] We therefore find that the discretionary factors listed in 29 C.F.R. §579.5(d) do not apply to reduce the penalty.

[11/] Elderkin presented a witness who testified that he recognized the handwriting on the notes as having been written by his brother. Elderkin did not explain why the alleged penman of the notes was not produced.

CONCLUSION

For the reasons discussed above, we find that the civil money penalty assessed by the Wage and Hour Division is appropriate, and reject Elderkin's assertion that sanctions should be imposed against the Administrator. The Respondent, Merle Elderkin, d/b/a Elderkin Farm, is ordered to pay a civil money penalty in the amount of $71,100.

SO ORDERED.

PAUL GREENBERG
Chair

E. COOPER BROWN
Member

CYNTHIA L. ATTWOOD
Member